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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1905.

Office Supreme Court U. S.
FILED
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No. [redacted].212

WILLIAM W. BIERCE, LIMITED, APPELLANT,

vs.

CLINTON J. HUTCHINS, APPELLEE.

MOTION FOR WRIT OF SUPERSEDEAS.

Now comes the appellant, by Charles H. Aldrich, its solicitor, and moves the court that a writ of supersedeas issue herein, and that the bond heretofore given in said cause and shown at pages 350–351 of the printed record stand as the bond upon said supersedeas; and in support of said motion the appellant suggests:

First. That the appellee or those in privity with him have the possession of the property in controversy, and such supersedeas will in nowise affect the possession or control of said property.

Second. That such supersedeas is necessary to preserve the rights of the appellant against the sureties upon the bond given to the sheriff upon the seizure of the property.

And in support of such motion the appellant files herewith and makes a part hereof the affidavit of William W. Bierce, bearing date the twenty-fourth day of February, A. D. 1906.

CHARLES H. ALDRICH,
Solicitor for Appellant.

IN THE SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, A. D. 1905.

WILLIAM W. BIERCE, LIMITED, *Appellant*,
vs.
CLINTON J. HUTCHINS, *Trustee, Appellee.*

Appeal from the Supreme Court of the Territory of Hawaii.

UNITED STATES OF AMERICA,
District of ——, } *ss:*

William W. Bierce, being first duly sworn, says that he now resides in the city, county, and Territory of Oklahoma, and until on or about the 1st day of May, A. D. 1905, was the president of William W. Bierce, Limited, a corporation created and existing by virtue of the laws of the State of Louisiana, which is the appellant in the above entitled cause; that as such president he has heretofore had active personal charge of the business and transactions involved in said suit and out of which said cause arose, as well as of the prosecution of said cause in both the courts below; that he, this affiant, still has a substantial pecuniary interest in said corporation, its property and rights, and makes this affidavit in its behalf and in support of the application it is about to make as the appellant in said cause for an order of court awarding a writ of supersedeas in said cause commanding the justices of the supreme court of the Territory of Hawaii to stay all proceedings on the judgment of the said supreme court of the Territory of Hawaii in said cause pending said appeal.

Affiant further says that for convenience he hereinafter mentions the parties to said cause by the titles and according to the positions they occupied in the court below, said appellant, William W. Bierce, Limited, as plaintiff and said appellee, Clinton J. Hutchins, trustee, as defendant.

Affiant further says that the necessity for the issuance of such writ of supersedeas in said causes arises in the following manner—that is to say, that, as shown by the sheriff's return to process of replevin issued in said cause at the time of the beginning thereof, on or about the 20th day of July, A. D. 1903, which return bears date the 22d day of July, A. D. 1903, the property levied upon by said sheriff by virtue of said process and in controversy in said cause, consisting of three hundred and sixty-two tons of steel railroad rails, two railroad locomotives, sixteen cane cars, and other plantation railroad equipment and material, was released to said defendant by said sheriff from the levy of said process and returned to said defendant upon the filing by him of a written undertaking for double the supposed value of the property so levied upon, which said process and return are shown upon pages 61 to 65, both inclusive, of the original transcript of the record in said cause filed in this court and upon pages 45 to 47, both inclusive, of the printed transcript of said record filed in this court.

That said undertaking mentioned in said sheriff's return is a so-called return or redelivery bond in the sum of thirty thousand dollars ($30,000.00), bearing date the 21st day of July, A. D. 1903, made by said defendant, Clinton J. Hutchins, trustee, as principal, and by Henry Waterhouse and Arthur B. Wood as sureties, and is conditioned for the delivery of all said property in controversy in said cause to said plaintiff, if such delivery be adjudged, and for the payment to said plaintiff of such sum as may for any cause be recovered against said defendant, and was filed in the circuit court in which said suit was begun on or about the 1st day of August, A. D. 1903, and still remains in the custody of said circuit court, and is shown on pages 66 and 67 of said original transcript and on pages 48 and 49 of said printed transcript.

That in the months of January and February, A. D. 1904, affiant made a trip from his place of residence, in Oklahoma

City aforesaid, to the city of Honolulu, in the island of Oahu, in said Territory, where he arrived on or about the 8th day of February, A. D. 1904, for the purpose, among others, of attending the trial of said cause as a witness on the part of said plaintiff, and on said trip remained in the city of Honolulu aforesaid about two months, or until on or about the 1st day of April, A. D. 1904; that while on said trip affiant was present at the trial of said cause in the circuit court of the first judicial circuit of said Territory, sitting at the city of Honolulu aforesaid, from about the 7th until the 12th day of March, A. D. 1904, and testified on said trial as a witness on the part of said plaintiff, and remained in the city of Honolulu aforesaid until some time after the entry of final judgment in said cause by said circuit court, on the 19th day of March, A. D. 1904, in favor of said plaintiff and against said defendant, as shown upon pages 425 to 428, both inclusive, of said original transcript and upon pages 273 to 275, both inclusive, of said printed transcript.

That in the month of May, A. D. 1904, after affiant's return from the city of Honolulu aforesaid to his place of residence, in Oklahoma City aforesaid, he was advised by letters received from counsel for said plaintiff residing in said city of Honolulu that said defendant had taken said cause up to the supreme court of said Territory for review by bill of exceptions in the nature of an appeal, for which purpose said defendant had executed and filed in said circuit court a certain bond upon exceptions running to the clerk of the judiciary department of said Territory, in the sum of one thousand dollars ($1,000.00), conditioned for the payment of court costs upon such exceptions in said cause in said supreme court, and further conditioned that the said defendant should not to the detriment of said plaintiff remove or otherwise dispose of any property he might have liable to execution on said judgment pending such exceptions, which said bond had been approved by said circuit court, and by virtue of the laws of said Territory operated as an arrest of judgment and

stay of execution on said judgment, provided, however, that said circuit court might, upon good cause shown, allow execution to issue or other appropriate action to be taken for the enforcement of said judgment, and, further, that said counsel in behalf of said plaintiff had made application to said circuit court and therein shown such cause, and thereby caused execution to issue on said judgment in said cause, and that said sheriff had attempted to levy said execution upon the property in controversy in said cause, but had been unable to take the same in execution thereunder, because said defendant had disposed of said property to third persons into whose possession the same had passed, and was also unable under said execution to make the moneys, or any part thereof, recovered by said plaintiff from said defendant by said judgment whereon said execution had been issued; wherefore said sheriff had returned said execution into said circuit court wholly unsatisfied.

That in the month of June, A. D. 1904, affiant was advised by letters received from counsel for said plaintiff residing in Honolulu that shorty prior to the 4th day of April, A. D. 1894, said Henry Waterhouse, one of the sureties on said return or redelivery bond, had departed this life at the city of Honolulu aforesaid, leaving an estate in said Territory of the estimated value of two hundred and forty thousand dollars ($240,000.00) in excess of all debts and liabilities of said Waterhouse, and leaving a last will and testament, wherein he had nominated and appointed William Waterhouse and Albert Waterhouse executors thereof; that said will had been admitted to probate and letters testamentary issued thereon to said executors by the court of said Territory having jurisdiction in that behalf, and that in pursuance of the statutes of said Territory said executors had, on the 4th day of April, A. D. 1904, published notice in a newspaper published in the city of Honolulu aforesaid to all creditors of said Henry Waterhouse, deceased, to present their claims, duly authenticated and with proper vouch-

ers, to said executors within six months from the date of such publication; that, according to the provisions of the statutes of said Territory in that behalf, any claim against the estate of said Henry Waterhouse, deceased, must be presented to said executors within six months after the 4th day of April, A. D. 1904, and prior to the 4th day of October, A. D. 1904, or be forever barred by the statutes of said Territory, with an exception as to a claim not due, which must be so presented within six months after it fell due, or be forever barred by said statutes; that, in accordance with further provisions of said statutes, in the event of the rejection by said executors of a claim so presented, a suit must be brought thereon in the proper court of said Territory against said executors within two months after such rejection, or within two months after such claim should become due, or else it would be forever barred by said statutes; that thereupon affiant consulted other counsel for said plaintiff concerning the matter of the presentation to said executors of a claim by said plaintiff upon said return or redelivery bond, and the advisability of bringing suit against said executors thereon in the event of their rejection of such claim, and in the month of July, A. D. 1904, was advised by such other counsel that by reason of said plaintiff's exercise of its right under the statutes of said Territory to have execution issue on said judgment, and of the failure of said defendant to deliver the specific property in controversy in said cause to the plaintiff and of his failure to pay to the plaintiff the moneys recovered against him by said judgment, the conditions of said return or redelivery bond had been broken and a cause of action thereon had accrued to said plaintiff against the principal and surviving surety thereon, as well as against said executors of Henry Waterhouse, the deceased surety thereon, and that unless said plaintiff should present its claim for damages on said bond for such breach or breaches thereof the said executors within six months from the 4th day of April, A. D.

1904, and, in the event of the rejection of such claim by said executors, bring suit thereon against them within two months after such rejection, such claim and cause of action would be forever barred by the statute of limitations of said Territory as against said executors and the estate of said Henry Waterhouse, deceased; that thereafter, and on or about the 1st day of August, A. D. 1904, affiant, as the president of said plaintiff corporation, by letter mailed to said counsel for said plaintiff residing in the city of Honolulu aforesaid, requested and instructed said counsel at once to present to the said executors said plaintiff's claim on said bond, and in the event of the rejection thereof by said executors immediately to bring suit thereon in the name and behalf of said William W. Bierce, Limited, against said executors and the surviving obligors on said bond, and that some time thereafter affiant was duly advised by letters received from said counsel that they had presented such claim in due form to said executors on the 30th day of September, A. D. 1904, that said executors had rejected the same, and that they, said counsel, thereupon, and on or about the 11th day of October, A. D. 1904, and within the time limited for that purpose by said statutes of said Territory, had begun an action of assumpsit on said bond in the circuit court of the first judicial circuit of said Territory in the name and in behalf of said William W. Bierce, Limited, against said Clinton J. Hutchins, trustee; Arthur B. Wood and William Waterhouse and Albert Waterhouse, as executors of the last will and testament of said Henry Waterhouse, deceased, for the recovery of the plaintiff's damages for breach of the conditions of said bond or for the value of said property assessed at the sum of twenty-two thousand dollars ($22,000.00) and recovered against said defendant, Clinton J. Hutchins, trustee, in and by said judgment, with interest thereon from the 19th day of March, A. D. 1904, and that thereafter such proceedings were duly taken and had in said action on said bond that by the service of process and by the voluntary

entry of their appearance therein jurisdiction was duly acquired of the persons of the defendants therein by said circuit court, and that all of said defendants duly appeared in said action on said bond in said circuit court and filed therein their formal answers to the plaintiff's complaint therein, traversing the averments thereof and denying their liability in said action.

That since the property in controversy in the above-entitled cause was released to said defendant by said sheriff from the levy of said process of replevin and returned to said defendant, on or about the 22d day of July, A. D. 1903, as aforesaid, none of said property has been returned or delivered to said plaintiff or to any one representing it, nor has the value of said property assessed and recovered by said judgment to the amount of twenty-two thousand dollars ($22,000.00), or any part thereof, ever been paid to said plaintiff or to any one representing it.

That during affiant's said trip to the city of Honolulu aforesaid he met and became personally acquainted with said defendant, Clinton J. Hutchins, trustee, and became personally familiar with his financial standing and condition, and that on numerous occasions since said trip affiant has been advised by letters received from counsel for said plaintiff residing at the city of Honolulu aforesaid respecting the financial standing and condition of said defendant Hutchins, as well as respecting the property and financial condition of said surviving surety, Arthur B. Wood, and that affiant is thereby informed and believes that said defendant, Clinton J. Hutchins, trustee, is a person of little or no financial responsibility and of doubtful solvency, and has no property situated within the Territory of Hawaii or elsewhere out of which said judgment for the value of said property, or any considerable portion thereof, could be collected by execution or otherwise, and that said surviving surety, Arthur B. Wood, is likewise a person of little or no financial responsibility and of doubtful solvency, and has no property situated

within the Territory of Hawaii or elsewhere out of which said judgment for the value of said property, or any considerable portion thereof, could be collected by execution or otherwise, and that said Wood, prior to the month of April, A. D. 1904, permanently removed from said Territory of Hawaii, and also removed therefrom and otherwise disposed of all of his property previously situated within said Territory, and took up a new residence in some place without said Territory, but that affiant by making diligent search and inquiry for that purpose has been unable to learn the present place of residence of said Wood or what property, if any, he owns without said Territory, and that the only effectual recourse said plaintiff now has for the recovery of the value of said property is against said executors and estate of said Henry Waterhouse, deceased, in said action on said return or redelivery bond, which said action is still pending and undetermined in said circuit court.

Affiant further says that he has been lately advised by counsel for said plaintiff residing at Honolulu that when said action on said bond was reached on the call of the trial calendar of said circuit court, at the beginning of the last January term thereof, the defendants in said action, by their counsel, opposed said plaintiff's application for a continuance thereof, but that said circuit court nevertheless ordered said cause to be continued until the next April term thereof, beginning on the 2d day of April, A. D. 1906, but has since allowed said defendants an interlocutory bill of exceptions from such order of continuance to the supreme court of said Territory, whereon they are seeking a review of such order of continuance in said supreme court, with directions to said circuit court to proceed to try said cause at said next April term thereof, which trial, if forced by the action of said territorial courts pending said appeal, could only result in a judgment in favor of the defendants in said action on said bond and against said plaintiff or in a judgment of dismissal or nonsuit, and that in the event said action on said

bond should be so disposed of by said circuit court a new action on said bond for the value of said property could not be maintained against said executors, the bar of said statute of limitations having long since become complete against the maintenance of such new action, and that in such event the further prosecution of said appeal, even although the same should result in a decision and judgment by this honorable Supreme Court of the United States reversing the judgment of the supreme court of said Territory in said cause and affirming the judgment of said circuit court in said cause, would nevertheless be ineffectual and idle, and wholly fruitless to said appellant.

And further affiant saith not.

WM. W. BIERCE.

Subscribed and sworn to before me this 24th day of February, A. D. 1906.

MARION L. SPITLER,
United States Commissioner.

UNITED STATES OF AMERICA, *Territory of Oklahoma,* } ss:

I, B. D. Shear, the duly appointed, qualified, and acting clerk of the district court for the third judicial district of Oklahoma Territory, do hereby certify that the Honorable B. F. Burwell, judge of said court, did on the 18th day of May, A. D. 1903, appoint Marion L. Spitler a United States commissioner in and for said district.

I further certify that on the said 18th day of May, A. D. 1903, the said Marion L. Spitler, appointed as aforesaid, did duly qualify, take the oath of office, and assume the duties of said office; that said appointment so made has never been suspended or revoked, and that the said Marion L. Spitler is now and has been ever since said 18th day of May, A. D.

1903, the duly appointed, qualified, and acting United States commissioner in and for said district.

Witness my official signature and the seal of said court this 24th day of February, A. D. 1906.

[Seal District Court, Territory of Oklahoma.]

B. D. SHEAR,
Clerk of said Court.
ANNE HOOVER,
Deputy Clerk.

[20519]